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Supreme Court, U.S.
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No. 10 - 120

# In The
# SUPREME COURT
# OF THE UNITED STATES

James D. Schneller,

*Petitioner*

v.

Fox Subacute at Clara Burke, Gary Drizin M.D., Debbie McCoy R.N., Marjorie Zitomer, G. Richard Schneller, T. Sergeant Pepper Esquire, Hepburn, Willcox, Hamilton, Putnam L.L.P., Pennsylvania Department Of Aging, Pennsylvania Department of Health, Division of Nursing Care Facilities - Norristown Field Office, Gary Layman, Judith Folan, Samuel J. Trueblood Esquire, Trueblood & Amacher L.L.P.,

*Respondents*

## REPLY BRIEF

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To the Honorable Justices of the Supreme Court:

Petitioner, representing himself, replies to the response brief of Marjorie Zitomer, Richard Schneller, & T. Sergeant Pepper, Esquire.

## I. REQUEST FOR CONSOLIDATION OR JOINT CONSIDERATION

Petitioner raises in section IV of the petition, a usefulness of consolidation of this petition with a concurrent petition filed the same month. That petition contains the same request. Third Circuit No. 09-4372 ( Schneller v. Prospect Park Nursing E.Pa. No. 08-5704), now No. 10-227, distributed for conference of October 15, 2010 on September 29, 2010; reply filed on or about October 12, 2010.

Petitioner requests in the petition the Courts' attention to the fact that he more fully argues the legal discussions, in the other petition, and likewise asks incorporation of this reply in the

other case and vice-versa .

The procedural difference between these cases is that, in this case, the District Court denied the motion to supplement the record, and the motion for Rule 11/28 U.S.C. §1927 sanction, in orders entered on the same day, September 9, 2009. In No. 08-5704, the district Court denied the motion to supplement the record, and the motion for Rule 11/28 U.S.C. §1927 sanctions, on September 4 and September 9, 2009, respectively. In this case, therefore, the Third Circuit's opinion includes adjudication and affirming, of the motion for sanctions *and* the motion to supplement the record.

## II. ARGUMENT

### A. In Reply To Factual Claims Presented

Respondents claims as listed below are objected to as false:

P.1 - Claims of a "factual record" in support of respondents' arguments misrepresent that a

factual record of any sort exists. While plaintiff swore under penalty of perjury as to many of his pleadings, the district Court ultimately refused to hold hearing. It is plainly evident also that respondents rely solely on their factual claims made in their pleadings, despite the fact that those were not certified nor attested to in any way, and despite the fact that plaintiff has raised a pervasive falsity in respondents' pleadings and objections to oversimplification of the fact base.

P. 9 - Respondents state numerous false facts regarding the status of cases in Pennsylvania state courts. Although plaintiff has validly claimed that one reason the district Court has jurisdiction, is because of an overt and voluminous denial of constitutional rights in state court decisions, respondents' false claims show the proclivity of the respondents to wrongly attempt to sway the courts with falsehood even in the face of claims made for such.

Furthermore, a showing is attempted to be made, that plaintiff is repetitively litigious, to which plaintiff responds that such is definitively not the case, that the petition, like the record, and like the record of petitioner's other cases in this

Court, show that petitioner does not file suits in any manner other than soundly permitted by law.

Respondents' effort to show that cases were ended omits the fact that most of the cases are alive, and are now accompanied by lawful efforts to transfer the within dismissed federal claims, which effort has coincided with an overall dead-ending of the cases, through inaction, or entry of hollow preliminary injunctions for the stated purpose of stopping "litigiousness" that was never proven. Respondents' claim of a Superior Court of Pennsylvania affirmation without opinion is completely false. The opinions entered in the three state appeals[1] in this matter are fraught with absences of review on the majority of legal issues,

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[1] This case joins defendants from cases in two different counties in the State courts, one of which went to appeal twice. This is a good example of why multiplicity of suit does not actually exist. It is also a good example of the defendant's willingness to falsely claim. A second appeal in the former case has literally disappeared in the offices of the Prothonotary of the Superior Court, and yet, if petitioner files an action for writ of mandamus to the Prothonotary that very Court would be deluged with hollow claims of over-litigating.

and an inability of them to stand as law of the case or res judicata.

The state claims alleged to be non prossed were not granted formal judgments of non pros, or were granted non pros as to irrelevant parties, and they exhibit voluminous additional details of this nature, including an apparent effort by the state courts to avoid an overextending in findings and conclusions, of what is an ongoing, shameful handling of the cases, furthered in the latter half by the sort of false pleading claimed in this proceeding, including in the appellate courts. Ministerial manipulativeness and obstruction is also claimed by petitioner, and in considerable volume. This became evident, with time, to be an effort to vex and obstruct, with an added intent that cases in mandamus, that petitioner would be justified in filing, would further the ongoing characterizations of him as litigious[2]. Extensive evidence in this regard, which also pertained to the statute of limitations defense in this case,[3] was

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[2] See Answer Brief p.9 - "matter derives from a series of civil actions . . . in the Courts of common pleas of various counties . . " which is exaggeration.

[3] Defendants and the trial Court likely sought to cause plaintiff the voluminous task of printing case

prevented in the district Court.

P. 24, 25 - Respondents claim that plaintiff's supplemental state claims were all barred by the 2 year statute of limitations, or, in the case of the 4 year statute of limitations, the relevant contract claims were improper they have "no viability in a medical malpractice case." These claims are irresponsible and fictitious, and are made with knowledge of their inapplicability. This and other defenses fall within the scope of the law regarding vexatious, harassing claims, worthy of an action for fees and costs. Certain contract claims in fact enjoy a 6 year statute of limitations. 42 Pa.C.S.§5527.

P. 28 - Respondents' claims of "a multitude of frivolous lawsuits" and "costly and unnecessary litigation" are expressly false.

It is petitioner's experience that these charges are made with the knowledge that the complex record of the litigation caused a need for either hearing (with concurrent reliance on Courts'

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record evidence to submit as affidavit submissions, but plaintiff, noting that defendant's purported defenses were lacking in documentary support, awaited hearing.

access to electronic records), or for a large, costly amount of documentary proofs.

Petitioner therefore respectfully requests that the Court order affidavits or remand for evidence, and admonishment to the respondents, for their bad faith falseness in this proceeding.

B. Reply Regarding Civil Rights and Timeliness

Defendants have stated a defense that petitioner's civil rights claims were insufficient as a matter of law, most of which petitioner hopes to have anticipated sufficiently in his petition. The matter, however, was not addressed in the Third Circuit because no briefing schedule nor argument ever occurred. Respondents did not even answer petitioner's statement in support of jurisdiction filed at the directive of the Clerk.

Respondents claim that all §1983 claims are unworthy. In the way of an answer, apart from the fact that the claims are alleged at a pronounced level against two state agencies, additional facets of state action are present. Petitioner, for instance, in his trial court briefs, claimed

liability under color of law *and* state action because private, individual conduct may be found to constitute state action (1) where state courts enforce agreement affecting private parties, (2) where state significantly involves itself with private party, or (3) where there is private performance of government function. Sament v. Hahnemann Medical College and Hospital of Philadelphia, 413 F.Supp. 434 (E.D.Pa.,1976) "at least when the state creates a system permitting private parties to substitute their judgment for that of a state official or body, a private actor's mere invocation of state power renders that [private] party's conduct actionable [as a joint actor with the state] under § 1983." Cruz v. Donnelly, 727 F.2d 79, 82 (3d Cir.1984). Plaintiffs claim that the system established under sections of Chapter 54 of Title 20 of the Pennsylvania Consolidates Statutes regarding Advance Health Directives and Chapter 55 of Title 20 of the Pennsylvania Consolidates Statutes regarding Incapacitated Persons, along with appellate decisions in that arena, allow a physician, a hospital administrator, and/or a living will surrogate, in some combination, to substitute their judgment for that of a Pennsylvania Orphans Court, and therefore to

perform government function, in matters of longevity of their patients' existence. Also, the Commonwealth by it's laws significantly involves itself with facilities, physicians, and surrogates. Foremost, the Chester County Register of Wills, on December 31, 2001, enforced an agreement affecting private parties Marjorie C. Schneller, James D. Schneller, surrogate Marjorie Zitomer; power of attorney Richard Schneller, and in many respects their attorney, T. Sergeant Pepper Esquire, and his firm. The agreement provided for a three way administration of the estate of George H. Schneller, but carried with it numerous legal implications, none of them explained to the plaintiffs. Said agreement and the decree of letters which enforced it substantially caused the acts of private performance of government function, where the state had significantly involved itself with private parties, and the circumstances permitted private parties to substitute their judgment for that of a state official or body. On top of that, removal of life support and care in Pennsylvania (which requires an unconscious victim, which is alleged to not be the case) requires agreement of two physicians or lawful permission from a AHD surrogate, and if objections are raised, the law requires Court

action. The substituting of private parties' judgment resulted through use of powers of attorney and advance health directives, and the defendants' invocation of State's authority and acquiescence was far above sufficient, so as to be considered state action within the Civil Rights Act. The intertwining alone is abundant support for jurisdiction. Klavan v. Crozer-Chester Medical Center, 60 F.Supp.2d 436 (E.D.Pa.,1999)

Furthermore, federal law mandates that the rights of the disabled be preserved and facilitated. e.g. Dipietrae v. City of Philadelphia, 666 A.2d 1132 (Pa. Cmwlth. 1995). The complaint claims a cause of action for discrimination to disabled under Federal grants and programs pursuant to 29 U.S.C. § 794 et seq.

Petitioner could not discuss these issues in a paper 10 times this length, and, the matter was not preserved, in any stretch of the law or rules.

In a similar fashion, respondents omit any discussion or mention of plaintiffs' claim of equitable tolling in regard to the statute of limitations, and the district Court's refusal of hearing, despite a lengthy argument, and selectiveness of issues

decided in the opinion, precludes any action but remand.

Petitioner claimed numerous legal reasons for irrelevance of the objections made for the statutes of limitations. The district Court, and thus the Third Circuit, avoided many of them, including petitioners' request for application of all statutes of limitations, on a count-by-count, statute-by-statute, and defendant-by-defendant basis. This does not absolve the respondents of accuracy and candor in this Court. Plaintiff could not fully reply to respondent's discussion on page 23 of their response, in five times this space, and the issues were not pled nor argued in the Third Circuit.

Despite the fact that petitioner only raises *examples* of the Third Circuit's abuse of discretion, respondents, who failed to participate in the proceedings in the Third Circuit in any way, now put forth a claim that insufficiency of the underlying case substantially affects this petition. It must be noted that the fact that the Third Circuit addressed the merits of plaintiffs' motion for rehearing, vacating, or reconsideration, has only narrow implications on review. Any facet of affirming would be abundantly egregious. Pet-

itioner has argued in the petition that dismissal of the complaint and denial of rehearing has been upheld and appears to have improperly affected the question of timeliness of appeal. The inference that appeal would not have been successful can in no way be a decision on the merits. One of the strongest evidences in this appeal is the fact that the District Court granted forma pauperis for appeal, a request that the same Judge has refused on numerous occasions prior.

Equally telling is omission in the response, as occurred in the district Court opinion, of petitioner's timely, valid efforts to withdraw the case as to some defendants in order to cause diversity jurisdiction.

C. Reply Regarding Necessity and Worthiness of the Requested Writ

As petitioner has argued in concurrent action 10-227, a sanctions order is not always an order separate from the action it stems from. Mr. Justice

Thomas has written for the unanimous Court, that "appellate review of a sanctions order [cannot] remain completely separate from the merits." Cunningham v. Hamilton County, 527 U.S. 198, 205, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999). A Rule 37(a) sanctions order will frequently be "inextricably intertwined with the merits of the action."

Plaintiffs naturally requested review of the denial of the request for sanctions. Reversal of the sanctions decision by the reviewing circuit court would have accentuated cause for amendment and opening of judgment on the case itself. That scenario proves a multiplying of proceedings through falsity, directly caused by defendants' litigation and falseness.

The issues in this petition are capable of repetition, and so there is compelling reason for the Court to set policy. Finality is a realm of appellate law that is consistently better defined by Courts when reasons arise. The question is an unsettled one. No case should see the order establishing finality set in stone nor at a sword-wielding gate of no return, and if some new evidence arises during the pendency of a motion,

even if not a motion for new trial or reconsideration, the law needs a consistent, fair policy so that parties acting within the guidelines of expedience and brevity are not forced to appeal early, or twice.

The fact that the Third Circuit issued opinions in this matter, in this case and in 10-227, discussing these legal questions, indicates that there is unsettled law and that compelling reasons exist for the Court's intervention. The Third Circuit has embraced the application of Cunningham, holding in Comuso v. Nat'l R.R. Passenger Corp., 267 F.3d 331, 338-39 (3d Cir.2001), that Cunningham applied to sanctions imposed under a district court's inherent powers for conduct that occurred outside the court . . earlier Third Circuit decisions allowing counsel to appeal sanctions immediately "are no longer good law to the extent that they conflict with Cunningham." Id. at 339. )

There is also a prevalence of State law in this matter, because of the substantive aspect, which in fact stands much in support of petitioner's claims of the tolling of time to appeal by way of his post-decision motions, pursuant to the same tenets of efficiency, and finality determined on a case by

case basis.

Further in support of certiorari, appellant's motion for sanction was extremely punctual, and was denied any realistic hearing or evidentiary hearing of the facts. The milieu of express claims of defendants' falsity and ulterior motive in making certain wide reaching and general claims is of record and was overtly present at the pre-trial conference held in the District Court.

Worse, if plaintiffs filed a notice of appeal to the earlier decision, they risked rendering the successive motions inactive or null.

Furthermore, plaintiff's requests for sanctions are meritorious. The Court is presented with new evidence of falseness in this very proceeding. Respondents' claims of "a multitude of frivolous lawsuits" and "costly and unnecessary litigation" which are expressly false, are thus, like the succession of false efforts to sway courts, bad faith. Willful bad faith is required for imposition of sanctions under statute permitting court to sanction counsel for conduct multiplying proceedings unreasonably and vexatiously. 28 U.S.C.A. § 1927. Alphonso V. Pitney Bowes, Inc., 356 F.Supp. 2d (D.N.J.,2005) Intentional

advancement of a baseless contention that is made for an ulterior purpose, such as harassment or delay, is indicative of bad faith for purposes of statute permitting court to sanction counsel for conduct multiplying proceedings unreasonably and vexatiously. Alphonso

The district Court had ample reason to expect an outcry from plaintiffs upon the filing of the false and misleading responses. Plaintiffs have often filed F.R.A.P.Rule 59 and Rule 60 motions in their actions.

The district Court's orders, in fact, are not made with prejudice, so that motions to amend or related effort to resolve prior to appeal were present and support appellant's diligence and relaiance on the group of issues discussed above, as the real conclusion of the case, after which the 30 day period ensued.

The fact that the District Court quickly decided the motion for sanctions shows a perception of the concurrent import that is claimed by plaintiffs. If treated as a motion for costs and fees, the motion could have been adjudicated at the trial Court's leisure. Moreso, the trial Court has granted leave to appeal in forma pauperis, causing a presumption

that the trial Court considers the imminent appeal to be jurisdictionally proper.

What, but vexation, prejudice, and additional costs, can result from false characterizations of the facts ? These, multiplied immensely if they assisted district court dismissal, now accumulate further, in additional falseness presented to the appellate courts. This reply itself is principally an effort to rid the record of falseness. Plaintiffs tolled the time for appeal because they urgently did what the law entitles them to do : to request an exercise of the Court's authority.

En banc rehearing

Respondents' claims that en banc rehearing was not warranted, and that there are no issues of exceptional importance or necessity, are unfounded, as supported by the magnitude of the error left unresolved, as seen in this reply and the case overall.

Beyond the illogic of the claim, it is important to note that the Third Circuit has veered to the unjust in this matter, and, as evidenced in the

record, in the case underlying No. 10-144, Schneller v. Able Home Care Inc., writ on which was denied last week. In that case the circuit court inexplicably refused payment of the fee for appeal, despite avenue for such seen in all precedent. That case has experienced that higher level of egregiousness in the district Court and in the state courts.

These cases involve clear and reversible error, and the opinions echo the District Court's many omissions of specific claims stated by plaintiffs in the pleadings, regarding both the presence of federal question, and statute of limitations, adhering instead to a particular set of conclusions that would cause the unsuspecting reader to conclude that the Courts had decided justly. Having pointed all of this out, petitioner claims that the Third Circuit was fully warranted and supported in every way, of a granting of reargument, upon review en banc.

## III. CONCLUSION

Contrary to respondents' claim, the circuit court's decision is in conflict with prior decisions of

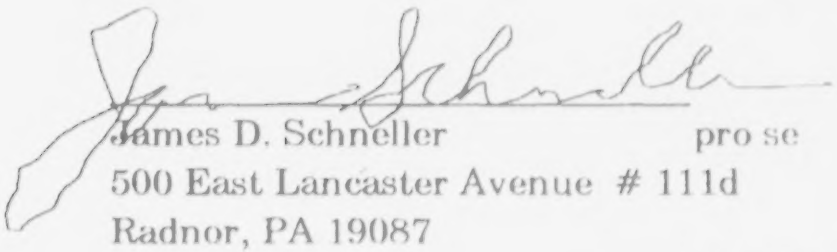
the Court. Statutes permitting appeals only from final decisions of federal district court or from interlocutory orders when they have a final and irreparable effect on rights of parties, disallows appeals from any decision which is tentative, informal or incomplete. 28 U.S.C.A. § § 1291, 1292. Cohen v. Beneficial Industrial Loan Corporation, 69 S.Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528 Statute providing for appeal only from final decisions of federal district court, does not permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. Cohen The purpose of statute providing for appeals only from final decisions of federal district court is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. 28 U.S.C.A. § 1291. Cohen

WHEREFORE, petitioner James D. Schneller respectfully requests that certiorari be granted, or, in the alternative, that the decision of the Third Circuit Court of Appeals be reversed.

WHEREFORE, petitioner respectfully requests joint or consolidated consideration of this case, with case No. 10 - 227, or the Court's alternative action as deemed appropriate.

WHEREFORE, petitioner respectfully requests vacating of judgment, and of any findings of lack of falseness and misrepresentation by defendants, and remand for order for hearing on all claims of false statements in this Court and the district court.

WHEREFORE, petitioner respectfully requests, for all of the reasons argued, in the event that certiorari is not granted, reversal or vacating, with instructions aimed at correction of the stated error regarding any decisions on the merits.



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